Filed 12/2/20 P. v. Peacock CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOHN C. PEACOCK, Defendant and Appellant.	D075833 (Super. Ct. No. SCD277298)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Conditionally reversed and remanded with directions.

Janice R. Mazur, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

In February 2019, a jury convicted John C. Peacock of one count of arson of property (Pen. Code, § 451, subd. (d)).[1] The trial court imposed a prison term of 12 years, comprised of the midterm of two years on the arson offense, doubled to four years for an admitted strike, plus the low term of three years on an admitted prior arson enhancement, plus five years for the prior strike conviction under section 667, subdivision (a)(1). The court imposed and stayed a one-year enhancement under section 667.5, subdivision (b).

Peacock appeals, arguing (1) the case should be remanded to allow the trial court to exercise its discretion to grant mental health diversion pursuant to section 1001.36, which allows courts to grant pretrial diversion to defendants who suffer from mental disorders and whose mental disorders played a significant role in the charged crimes; and (2) the case should be remanded for resentencing to allow the trial court to exercise its discretion to strike the formerly mandatory five-year enhancement under sections 667, subdivision (a)(1) and 1385. The Attorney General asserts, and Peacock agrees, that the trial court erred in imposing and staying rather than striking the one-year prison prior enhancement.

Under *People v. Frahs* (2020) 9 Cal.5th 618 (*Frahs*), the mental health diversion statute applies retroactively in this case, and we exercise our discretion to address Peacock's contention despite any forfeiture. We therefore reverse the judgment with directions for the trial court to determine whether to grant mental health diversion under section 1001.36. If the trial court grants diversion, it shall proceed under that statute. If the trial court does not grant diversion, the trial court shall resentence Peacock.

---

1 Unless otherwise indicated, statutory references are to the Penal Code.

As part of the resentencing, the court should strike the one-year prison prior enhancement and consider whether to exercise its discretion to strike the prior five-year serious felony conviction enhancement.

FACTS

A. *June 2018 Arson Incident*

Peacock rented a room in V.V.'s house beginning in July or August of 2017. According to V., Peacock was quiet and kept to himself, but he would sometimes join V. and her family for meals. In June of 2018, V. noticed Peacock's behavior and demeanor had changed. He became agitated and curt and would mumble to himself. On the morning of June 16, V. heard Peacock outside her window muttering curse words and using "antagonistic . . . language." She observed him outside, wearing a long T-shirt with no pants, holding her garden hose and standing near her car, which appeared to have been hosed off. He said he was " 'cleaning this place up.' " V. noticed he was wearing a wide belt, and her largest kitchen knife was wedged into the belt. V. told him to put some pants on and to give her the knife. Peacock gave her the knife, but V. said he seemed "pissed off." Inside the house, which was empty, V. noticed that knives had been placed at each bedroom door. V. became scared and called the property manager. While she was waiting for the property manager to arrive, V. saw Peacock—now fully dressed—point his right hand at her, shaping his fingers like a gun, and say, " 'I'm not scared of you. I'll kill you.' " He was agitated and cursing.

The property manager arrived at the house and spoke with Peacock. V. could hear them speaking outside. Peacock was no longer swearing or mumbling. She heard Peacock casually tell the property manager "he could have the house burned down. It would be so easy." He said, " 'pour gasolina.' " The property manager called the police.

A few days later, on the morning of June 19, V. smelled a burning odor. She rushed into the kitchen and saw Peacock in front of the lit stove, which was piled with cutting boards, paper, and a rice cooker. The flames were four to six inches high. V. turned off the stove and used a kitchen towel to put out the flames. She asked him, "What are you doing?" and "What's wrong?" She told Peacock, "You're going to burn the house down," and he responded, "Good."

V. called Peacock's son, who spoke on the phone briefly with Peacock. V. returned to her room to get ready for an appointment but soon smelled the same burning odor. She ran back into the kitchen and saw Peacock, again standing in front of the stove, watching the same items burn. The flames were now over a foot high. At that moment, the phone rang; the San Diego police dispatcher had called V.'s home, apparently in response to a report received from Peacock's son, in Colorado.

While V. waited for police and firefighters to respond, she saw Peacock, outside, using his hands to put shaving lotion on a telephone pole. Then he lay down next to a tree in the front yard.

Police and firefighters responded to the scene and officers arrested Peacock.

B. *Complaint*

On June 21, 2018, Peacock was charged in a felony complaint with one count of arson (§ 451, subd. (d)). The complaint alleged he had a prior felony arson conviction (§ 451.1) and a prison prior (§§ 667.5, subd. (b), 668) based on a 2014 arson conviction (§ 452, subd. (c)), and a serious felony prior

(§§ 667, subd. (a), 668, 1192.7, subd. (c)) and strike prior (§§ 667, subds. (b)-(i), 1170.12, 668) based on a 2006 criminal threats conviction (§ 422).[2]

C. *Competency Proceedings*

In July 2018, the public defender appointed as Peacock's counsel expressed doubt regarding his competency and requested that proceedings be suspended pursuant to section 1368. The court suspended proceedings "[b]ased on counsel's representations about defendant's present mental competency."[3]

On September 10, 2018, Peacock was examined by Alma Carpio, a Doctor of Psychology with the Forensic Psychiatry Clinic of the Behavioral Health Services division of the county Health and Human Services Agency. On September 25, 2018, Dr. Carpio filed a report recommending that Peacock "presently be considered competent to stand trial" and that his criminal proceedings be resumed.

Dr. Carpio's recommendations were based on an examination of Peacock and a review of his arrest records and jail psychiatric notes. Dr. Carpio's report described Peacock's progress as reflected in the jail psychiatrists' notes. Peacock had been placed in enhanced observation housing and treated by jail psychiatrists for mood instability. On June 21, jail psychiatrists reported he was irritable and uncooperative, and he

---

2 On December 4, 2018, the complaint was deemed an information.

3 "If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing . . . ." (§ 1368, subd. (b).) "[W]hen an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." (*Id.*, subd. (c).)

expressed delusional thought content and refused psychotropic medications due to paranoia. At that time, jail psychiatrists reported diagnostic impressions of bipolar disorder, history of amphetamine use disorder, and history of alcohol use disorder. Peacock was later moved to the jail's inpatient psychiatric security unit, and on June 30, doctors observed he was "disorganized" and made comments characterized as " 'non-sequiturs.' " At that time, doctors reported diagnostic impressions of "psychosis not otherwise specified and combination drug use disorder." On July 4, doctors reported that Peacock "continued to be floridly psychotic. He was unable to find food and wear appropriate clothing." Because Peacock continued to refuse psychiatric medication, doctors filed for an involuntary medication order. By August 1, notes indicated Peacock's agitation was resolving and his thought process was "more linear and logical, though he continued to be perseverative." At that time, the diagnostic impression was changed to "schizoaffective disorder, bipolar type." Peacock continued to improve. By August 9, notes indicated "[h]is delusions and paranoid ideations were no longer evident."

During his examination, Peacock told Dr. Carpio that he was currently taking Metformin and Zyprexa. He told the doctor "he plans to plead not guilty and that his defensive strategy is that, at the time of the crime, he was not well and had discontinued his psychiatric medication." Peacock further stated that "he now understands that he needs his psychiatric medication and that, if he discontinues the medication, he decompensates."

Dr. Carpio reported a diagnostic impression of "[u]nspecified schizophrenia spectrum and other psychotic disorder, [r]ule out bipolar disorder." The report indicated that "[d]uring the forensic interview, the defendant presented with a normal mental state, though he was, at times,

slow to respond. The defendant reports a history of psychiatric symptoms including multiple psychiatric hospitalizations in the community. The defendant is currently placed in the . . . inpatient psychiatric unit in the jail[] and is receiving psychiatric treatment. It appears that his treatment is helping to control the symptoms of his psychiatric illness." The doctor opined that Peacock "is capable of understanding the nature of the criminal proceedings" and "presently able to assist his attorney in conducting his defense in a rational manner."

Based on the report, the trial court found Peacock mentally competent to stand trial.

D. *Trial and Sentencing*

The case proceeded to jury trial in January 2019. At trial, jurors heard testimony from V., a fire investigator from the San Diego Fire-Rescue Department, and two officers of the San Diego Police Department. Videos showing body-camera footage of officers' interactions with Peacock on the day of the incident were shown to the jury during trial. Peacock presented no additional evidence in his defense. After deliberating, the jury found Peacock guilty of one count of arson of property (§ 451, subd. (d)).

For sentencing purposes, Peacock admitted the prior conviction allegations.

Prior to sentencing, the district attorney submitted a statement in aggravation which detailed a 2006 conviction for criminal threats (§ 422), a 2008 conviction for possessing an incendiary device (§ 453, subd. (a)), and a 2015 conviction for unlawfully causing a fire (§ 452, subd. (c)). The district attorney also described a prior uncharged incident in which Peacock was alleged to be involved in another arson incident (§ 451, subd. (b)).

Peacock's counsel submitted a statement in mitigation, requested the court to dismiss the strike prior under section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, and requested the court to stay any potential prison sentence and place Peacock on formal, supervised probation. Counsel argued the crime "was the direct result of a manic episode in which [Peacock] admitted that he had stopped taking his medication." The crime "demonstrates a very mentally ill person who needs consistent services to ensure medication management." "When connected with community services and consistent case management, Mr. Peacock can be successful on probation and remain law-abiding." "[W]ith the appropriate services that the [d]efense [t]ransition [u]nit has been working on setting up for Mr. Peacock, [we] can provide him with the support to achieve success on probation."

In support of the request for probation, counsel attached two psychological reports prepared by an independent psychologist.[4] The evaluating psychologist indicated he had reviewed an extensive list of police documents and reports, administered various tests, and performed a clinical interview and mental status exam of Peacock. During his interview, Peacock explained to the psychologist that he has a history of mania and bipolar disorder. He was first diagnosed in 1983, and "his arrest history typically corresponds with his experience of mania." The psychologist noted diagnoses of severe bipolar disorder, adjustment disorder with anxiety, and mild alcohol use disorder.

---

[4] The reports were prepared for the purpose of determining what mitigating factors should be considered in connection with the offense and to identify treatment concerns. The two reports were comprised of an initial report that was subsequently revised to provide more specific information regarding Peacock's prior fire-related incidents.

In the most recent report, the psychologist noted that, in addition to the current offense, Peacock had other prior convictions related to fire-setting, including a conviction for possession of an incendiary device and a conviction for recklessly causing a fire. With respect to Peacock's fire-setting risk, the psychologist noted that in all the incidents, Peacock was described as behaving erratically, and he attributed the events to Peacock's manic phase, substance use, or a combination of these two factors. The psychologist concluded that Peacock "presents with mild to moderate risk for intentional fire-setting. He was noted to have several prior incidents of fire-setting or being strongly suspected of setting fires. The two underlying risk factors include an underlying bipolar disorder, and suspected substance-use. . . . It should be noted that if [Peacock] strictly adheres to his psychiatric medication regimen, and if he abstains from all substance[]use, his risk of setting another fire is greatly reduced if not completely mitigated."

The psychologist indicated that Peacock "committed to staying on his medication indefinitely to avoid the serious consequences of his actions while in a manic episode." The psychologist opined that "[i]t is likely that if he engages in the recommendations below, the severity of his psychiatric symptoms would be greatly reduced, thereby decreasing the likelihood of another arson offense." The psychologist recommended that Peacock "strictly adhere to his psychiatric medication regimen," "abstain from all substance use," "be enrolled in a community-based mental health program where his case can be overseen by a team of treatment providers including a psychiatrist, psychologist, and substance abuse counselors," "become more educated in regards to his clinical presentation so that he can make informed decisions in the future and potentially prevent another manic episode," and regularly visit with his psychiatrist. The psychologist emphasized "that

when stable on his medication, and when not using substances, [Peacock] is law-abiding and functions well. He was not found to harbor criminal attitudes and appears to have insight into the need to maintain stability and treat his mental illness."

A probation report was prepared in anticipation of sentencing. Peacock told the probation officer he could not recall the incident and was "in a total blackout." He did not deny committing the crime and explained to the probation officer that his behavior becomes erratic when he does not take his psychiatric medications, and he had not taken his medications for one month before the crime was committed. The probation report recommended imposing the middle term on the arson count, the low term of the section 451.1 enhancement, plus "mandatory consecutive" terms of one and five years under sections 667.5, subdivision (b), and 667, subdivision (a)(1), respectively.

At sentencing, the prosecutor argued that, "if his criminal history is a product of his mental health disorder and his substance abuse disorder, he's incapable of controlling either of those things. It is always just a matter of time before . . . he relapses, and when he relapses he's an extreme danger to the community." Defense counsel argued that Peacock should be placed on probation with sufficient case management and support services to sufficiently mitigate the chance of relapse. Defense counsel discussed potential services (in addition to the probation department) that could provide oversight but acknowledged she was unable to "set up" a housing component, which counsel noted was difficult in light of Peacock's arson conviction.

The trial court noted, "I am totally accepting the idea . . . that the man that I have here and have had during the course of the trial's very different

than the man that I saw in the videos when this occurred, so it is—I do think that his behavior's as a result of the bipolar condition that he has." However, the trial court indicated it would decline to strike the prior strike conviction and impose a sentence following the probation department's recommendation.

Defense counsel then requested the court to sentence Peacock to the low terms on the arson offense and the enhancement, and to "strike . . . the prison prior as well as the nickel prior."

The trial court imposed a prison term of 12 years, comprised of the midterm of two years on the arson offense, doubled to four years for the strike, plus the low term of three years on the prior arson enhancement, plus five years for the prior strike conviction.[5] The trial court imposed and stayed a one-year prison prior enhancement under section 667.5, subdivision (b).

DISCUSSION

I.

Mental Health Diversion

Section 1001.36 was enacted on June 27, 2018 and took effect immediately.[6] (Stats. 2018, ch. 34, §§ 24, 37.) Section 1001.36 sets forth a pretrial diversion program for certain defendants diagnosed with qualifying mental disorders. (§ 1001.36, subd. (a).) If a defendant meets the criteria specified in the statute, the trial court may postpone criminal proceedings to

---

5 Regarding the five-year enhancement for the prior strike conviction, the trial court stated it was "going with the probation officer's recommendation page. And it is mandatory consecutive and I'm going to impose the 667(a)(1) of the five years."

6 The arson incident took place on June 19, 2018 and initial charges were filed promptly on June 21. The statute was enacted and took effect just days later.

allow the defendant to undergo mental health treatment.[7] (§ 1001.36, subds. (a), (c).) If the defendant performs satisfactorily in diversion, the trial court shall dismiss the criminal charges against the defendant that were the subject of the criminal proceedings at the time of the initial diversion.[8] (§ 1001.36, subd. (e).) Our Supreme Court recently held that the mental health diversion statute applies retroactively to cases not yet final as of its effective date. (*Frahs*, *supra*, 9 Cal.5th at p. 630.)

---

[7] Specifically, a court may grant mental health diversion under the statute if the following criteria are met: (1) the defendant must suffer from a qualifying mental disorder; (2) the mental disorder must have been a significant factor in the commission of the charged offense; (3) in the opinion of a qualified medical expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment; (4) the defendant consents to diversion and waives his or her right to a speedy trial; (5) the defendant agrees to comply with treatment as a condition of diversion; and (6) the defendant will not pose an unreasonable risk of danger to public safety, defined as an unreasonable risk that the petitioner will commit a new violent felony specified by statute, if treated in the community. (§§ 1001.36, subd. (b)(1)(A)-(F), 1170.18, subd. (c).)

[8] The Legislature subsequently amended section 1001.36, effective January 1, 2019, to eliminate diversion eligibility for defendants charged with certain specified offenses. (Stats. 2018, ch. 1005, § 1.) All references to section 1001.36 are to this amended version of the statute. Peacock is not statutorily ineligible for pretrial diversion based on the offenses he committed.

The Attorney General contends Peacock forfeited his claim to pretrial mental health diversion by not requesting it in the trial court.[9] Even if the claim was forfeited, we exercise our discretion to consider Peacock's argument on the merits.[10] (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [appellate court generally has discretion to consider unpreserved claims]; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984, italics omitted [" '[t]he fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue.' "].)

"[A] conditional limited remand for the trial court to conduct a mental health diversion eligibility hearing is warranted when, as here, the record affirmatively discloses that the defendant appears to meet at least the first threshold eligibility requirement for mental health diversion—the defendant suffers from a qualifying mental disorder." (*Frahs*, *supra*, 9 Cal.5th at p. 640.) Peacock easily meets this requirement. The record indicates that Peacock reported he has a history of mania and bipolar disorder and was first diagnosed in 1983. A psychologist with the county forensic psychiatry clinic, jail psychiatrists, and an independent psychologist each separately diagnosed

---

9 The Attorney General alternatively contends the claim is procedurally barred because he did not raise it prior to adjudication. The *Frahs* court rejected a similar contention as "unconvincing" and concluded the law "applies 'retroactively' to cases already past the procedural point at which the new law ordinarily applies—here, cases that have already been adjudicated but the judgment was not yet final." (*Frahs*, *supra*, 9 Cal.5th at p. 640.)

10 In this appeal and in a companion habeas petition, D077570, Peacock contends that counsel was ineffective for failing to request pretrial diversion in the trial court. Because we exercise our discretion to consider Peacock's claim on the merits, we decline to address this contention, and by separate order in D077570, we dismiss the habeas petition as moot.

Peacock with various mental disorders. (§ 1001.36, subd. (b)(1)(A) [the defendant must suffer from a qualifying mental disorder].)

The psychological evaluations indicate that the arson incident corresponded with Peacock's mania but that Peacock's condition was controlled with medication.[11] This indicates the second and third threshold requirements—that mental disorder must have been a significant factor in the commission of the charged offense (§ 1001.36, subd. (b)(1)(B)) and that, in the opinion of a qualified medical expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment (*id*., subd. (b)(1)(C))—may also be met.

The next two factors, that defendant consents to diversion and agrees to comply with treatment as a condition of diversion, are requirements that involve decisions by Peacock, and we infer from his pursuit of diversion on appeal that he would consent to diversion and agree to treatment. Finally, the trial court must be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community." (§ 1001.36, subd. (b)(1)(F).) In this context, this requirement means that the defendant cannot pose an unreasonable risk that he or she will commit a new violent felony specified by statute. (*Ibid*.; see § 1170.18, subd. (c); see also § 667, subd. (e)(2)(C)(iv).) "These violent felonies are known as 'super strikes' and include murder, attempted murder, solicitation to commit murder, assault with a machine gun on a police officer, possession of a weapon of mass destruction, and any serious or violent felony

---

11 At sentencing, the trial court found Peacock's crime was committed "as a result of [his] bipolar condition," and also observed that Peacock appeared to respond well to treatment, noting that "the man that I have here and have had during the course of the trial's very different than the man that I saw in the videos when this occurred . . . ."

punishable by death or life imprisonment." (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 242.) None of Peacock's current or past convictions is listed as a "super strike" under the statute. (See § 667, subd. (e)(2)(C)(iv).) Given the high standard for a finding of dangerousness relating to the final criterion, Peacock could potentially satisfy that requirement too as he lacks any "super strike" convictions.

Peacock's prior strike conviction—which makes him ineligible for probation or a suspended sentence under the "Three Strikes" law, section 667, subdivision (c)(2)[12]—does not preclude the possibility of mental health diversion for Peacock. "[B]y conditionally reversing defendant's convictions and sentence for an eligibility hearing under section 1001.36, the case would be restored to its procedural posture before the jury verdict for purposes of evaluating defendant's eligibility for pretrial mental health diversion. [Citation.] At that point, defendant faced a mere allegation of a prior serious felony conviction, which is not enough to prohibit a suspended sentence or diversion." (*Frahs*, *supra*, 9 Cal.5th at pp. 639-640, citing with approval *People v. Burns* (2019) 38 Cal.App.5th 776, 789.) Therefore, the fact that Peacock was sentenced pursuant to the Three Strikes law does not make him ineligible for mental health diversion under section 1001.36.

We reject the Attorney General's argument that there is not a reasonable probability that the trial court would permit Peacock to

---

12 This statute provides: "Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions as defined in subdivision (d), the court shall adhere to each of the following: [¶] . . . [¶] (2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense." (§ 667, subd. (c)(2).)

participate in pretrial mental health diversion because the trial court considered and rejected counsel's request for probation at sentencing and that, on the current record, "there is no indication that an in-patient facility was available to meet [Peacock's] needs." The *Frahs* court rejected a similar claim that remand in that case "would be pointless because the trial court has already made findings that cast defendant as unsuitable for diversion" and determined "there were no 'significant mitigating factors' that weighed in favor of striking defendant's prior enhancement." (*Frahs*, *supra*, 9 Cal.5th at p. 638.) As in *Frahs*, the trial court's findings here "do not conclusively establish that a remand would be futile." (*Id*. at p. 639.) Of course, the trial court will ultimately have the opportunity to consider the sufficiency of Peacock's request on remand.

We therefore reverse the judgment with directions for the trial court to hold a hearing under section 1001.36 to determine whether to grant diversion under that statute. (*Frahs*, *supra*, 9 Cal.5th at p. 640.) We express no opinion on the merits of that determination or any criterion thereunder.

II.

Five-year Serious Felony Sentencing Enhancement

At sentencing, defense counsel requested that the court "strike . . . the [section] 667.5 [subdivision] (b) allegation prison prior as well as the nickel prior" (§ 667, subd. (a)(1)). The court stayed the one-year prison prior enhancement (§ 667.5, subd. (b)),[13] but with respect to the serious felony (or "nickel") prior, commented, "I'm going with the probation officer's

13 The one-year prison prior is discussed in section III, *post*.

recommendation page. And it is mandatory consecutive and I'm going to impose the [section] 667 [subdivision] (a)(1) of the five years."[14]

Peacock contends the trial court failed to recognize its discretion to strike the serious felony prior under Senate Bill No. 1393, and he is entitled to remand for resentencing to allow the trial court an opportunity to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement.

Prior to January 1, 2019, trial courts were required to impose a five-year consecutive term for "[a]ny person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (former § 1385, subd. (b)). (See *People v. Williams* (1987) 196 Cal.App.3d 1157, 1160 [former section 1385 "remove[d] from the trial court all discretion to strike the prior felony convictions, thus rendering imposition of a five-year enhancement for each such prior conviction a certainty"].) Effective January 1, 2019, trial courts have discretion to strike a formerly mandatory five-year enhancement applicable to defendants who have suffered a prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2.)

The Attorney General argues remand is unnecessary because at sentencing defense counsel requested that the serious felony prior be stricken and the trial court stated it would impose the five-year term. The Attorney General contends this shows "[t]he trial court was obviously aware of its discretion." However, the record indicates otherwise. The trial court said,

---

14 The probation officer's report filed in anticipation of sentencing indicated that "[t]he admitted allegation [under] [section] 667 [subdivision] (a)(1) adds an additional mandatory consecutive term of five years." The report recommended imposing "5 years (mand consec)" for "[a]llegation PC667(a)(1)" on top of the base term.

"I'm going with the probation officer's recommendation page," which indicated the five-year term was "mandatory consecutive." The trial court stated, "[I]t is mandatory consecutive and I'm going to impose the [section] 667 [subdivision] (a)(1) of the five years."

" '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Remand is not required, however, if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid.*) Here, the court denied Peacock's *Romero* motion but applied the middle term for the arson count and the low term for the enhancement. Further, the trial court stayed imposition of the one-year prison prior enhancement. This record does not clearly indicate that the trial court would not have stricken Peacock's prior serious felony conviction for sentencing purposes if it was aware it had the discretion to do so. (*McDaniels*, at p. 425.) We therefore conclude remand is warranted to allow the trial court to exercise its discretion to strike the formerly mandatory five-year serious felony enhancement. We express no opinion as to how the trial court should exercise its discretion.

III.

One-year Prison Prior Sentencing Enhancement

As noted, in response to counsel's request at sentencing that the trial court strike the one-year prison prior (§ 667.5, subd. (b)), the trial court stayed, but did not strike, the one-year prison prior enhancement. The Attorney General contends, and Peacock agrees, that this was an error that

resulted in an unauthorized sentence. The parties further agree the one-year prison prior enhancement must be stricken.

"Once the prior prison term is found true within the meaning of [Penal Code] section 667.5 [subdivision] (b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken." (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) If the trial court exercises its discretion to strike the allegation, it must provide a statement of reasons for doing so. (§ 1385, subd. (a); *People v. Bonnetta* (2009) 46 Cal.4th 143, 150-151.) Here, the trial court gave reasons for imposing its sentence. The trial court specifically indicated it did not want to impose the one-year term and would stay the enhancement "unless probation tells me what I have to do is strike it." We therefore direct that, in the event Peacock is resentenced on remand following the conditional reversal of judgment, the trial court shall strike the one-year prison prior enhancement and resentence him to a term no longer than the original term imposed.[15] (*People v. Wright* (2019) 31 Cal.App.5th 749, 756-757.)

DISPOSITION

The judgment is conditionally reversed. The matter is remanded to the trial court with directions to hold a mental health diversion eligibility

---

15 The enhancement must be stricken for an additional reason: Senate Bill No. 136, effective January 1, 2020, amends the convictions that qualify for one-year enhancements pursuant to section 667.5, subdivision (b). (Stats. 2019, ch. 590, § 1, eff. Jan. 1, 2020.) As amended, one-year prison prior enhancements can only be imposed on a defendant who has a prior conviction for a sexually violent offense. (*Ibid.*) Peacock's prior convictions do not include a sexually violent offense. The amendment applies retroactively to all judgments that are not yet final on January 1, 2020. (*In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Jennings* (2019) 42 Cal.App.5th 664, 680-681.) The statute therefore applies in this case to preclude imposition of any one-year prison prior enhancement.

hearing under Penal Code section 1001.36. If the trial court determines that Peacock is eligible for diversion, the court may exercise its discretion to grant diversion, and if Peacock successfully completes diversion the court shall dismiss the charges. (§ 1001.36, subd. (e).)

If the trial court does not grant diversion, or it grants diversion but Peacock does not satisfactorily complete diversion (§ 1001.36, subd. (d)), then the court shall reinstate his convictions and conduct further resentencing proceedings consistent with this opinion. At any resentencing, the trial court shall exercise its discretion with respect to whether to strike or reimpose the five-year prior serious felony conviction enhancement and shall strike the one-year prison prior enhancement.

GUERRERO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.